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No. 97-1147

In the

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA,

Petitioner,

vs.

WAYNE THOMAS CARTER, AND
MELVIN JOHNS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

A. Respondents and their supporters have erroneously generalized the State of Minnesota's argument concerning standing.

Respondents and their supporters have defined the State of Minnesota's position as one that would automatically deny a guest's ability to object to a search of a host's residence under the Fourth Amendment if the guest is engaged in unlawful activity in the residence. Using this erroneous generalization respondents and their supporters argue that the State's position is inconsistent with the history, purpose and application of the Fourth Amendment by this Court. Such generalizations and arguments should be rejected.

In framing its argument as to the standing issue, the State has primarily relied upon the following premises:

- Defendants must identify a personal privacy interest in the area searched — protected by the Fourth Amendment — and not the privacy interests of co-conspirators or third parties.

- In determining the legitimacy of a defendant's privacy interests under the Fourth Amendment, courts should examine the totality of the circumstances.

- A defendant's physical presence and common task with one in lawful possession merely demonstrates that the defendant is legitimately on the premises.

- Being legitimately on the premises, in and of itself, is insufficient to establish a protected privacy interest under the Fourth Amendment.

- Under the totality of the circumstances analysis, the nature of a defendant's common task with one in lawful possession of a residence is a relevant consideration.

Using these premises, it is the position of the State that Carter and Johns have failed to establish a constitutionally protected privacy interest in the apartment of their co-conspirator.

Respondents' attempt to establish a protected privacy interest by defining themselves as "social guests" in the home of their co-conspirator lacks factual support. Carter and Johns were not using the apartment to engage in social activities normally associated with a dwelling. Instead they were using the apartment as a place of business. Their sole purpose for being present was to package drugs for illegal distribution. Every court that examined the factual record has reached this same conclusion. Seeking constitutional protection of their unlawful activity under the guise that at the time of the search that they were social guests constitutes a distortion of the facts which must be rejected by this Court.

The State acknowledges that warrantless searches of homes should be subjected to close scrutiny under the Fourth Amendment. Persons, however, are not always invited into homes for lawful purposes or for reasons which serve societal interests. Because the Fourth Amendment was created to protect legitimate privacy interests and not illegal activity, unlawful acts cannot be used to create a legitimate expectation of privacy under the Fourth Amendment. Engaging in an illegal common task in another's home with the homeowner does not, in and of itself, confer standing to the guest under the Fourth Amendment — there must exist evidence that the guest was using his host's home for those intimate activities normally associated with a dwelling.

To allow Carter and Johns to establish a constitutionally protected privacy interest on the mere fact they were invitees into the home of their co-conspirator, without an examination

into the nature of the activity, in essence allows them to vicariously assert the privacy interests of their host. To accept respondents' argument will automatically grant standing to any invitee into a residence. The purpose for an invitee's presence, the length of time of the stay, or the invitee's exercise of dominion or control over the residence, and other considerations will become irrelevant. Under the respondents' argument, a defendant who is invited into the residence by the homeowner to commit arson so that the homeowner can fraudulently collect on the insurance policy has the same constitutionally protected privacy interest as an overnight guest or others who are present for traditional social activities.

Defendants who seek a protected privacy interest based only on the fact that they were present at the time of a search and engaged in an illegal activity with one in lawful possession do not have standing to object to a search of the premises under the Fourth Amendment. Although criminal conduct will not destroy an established legitimate expectation of privacy, such acts cannot be used to create a constitutionally protected privacy interest.

B. Respondents and their supporters mischaracterize the State of Minnesota's position pertaining to whether Officer Thielen's conduct constituted a search under the Fourth Amendment.

Respondents and their supporters imply that the State is arguing that because Officer Thielen was "in a place where he was allowed to be," this is dispositive of the search issue. See Respondents' Brief on the Merits, p. 29, and Brief Amicus Curiae of the American Civil Liberties Union, et al., p. 21. This is not the position of the State of Minnesota. A search may occur even if an officer is in a legitimate location at the time of his observation of the interior of a residence. For

example, a search may occur if electronic listening devices are used or some other form of enhancement of one's natural senses is utilized. *Katz v. United States*, 389 U.S. 347 , 88 S.Ct. 507 (1967).

Contrary to Respondents' implications, the State's argument is based upon the long-standing two-pronged test as to whether a search has occurred: (1) the location of the officer at the time of the viewing; and (2) the precise manner in which the view is achieved. See Brief of 26 States As Amici Curiae In Support of Petitioner, pp. 13-14. Respondents wish this Court to ignore this long-standing test, as the Minnesota Supreme Court did, and focus upon the measures Officer Thielen took before making his visual observations into the apartment. By focusing upon how the officer got to the location and not what he did when he arrived there, the Minnesota Supreme Court not only ignored the first prong of the test in its entirety, but also totally misconstrued the second prong of the test as well. The second prong of this test was not intended to involve an analysis of how the officer obtained his vantage point, but rather what methods he used to make his observation. An officer is entitled to make non-enhanced observations of criminal activity from a common area outside the curtilage of an apartment. The effect of the Minnesota Supreme Court ruling is that an officer could never walk up to a residence and look through the window even if he were outside the curtilage and in a public or common area. If this logic is allowed to stand, it will overrule long-established precedents of this Court as to whether a search occurred. See *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735 (1984); *Caliornia v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1089 (1986); *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134 (1987); and *Florida v. Riley*, 488 U.S. 445, 109 S.Ct. 693 (1989).

C. Respondents' reliance upon Minnesota's invasion of privacy law is inappropriate.

1. State privacy laws are not dispositive of Fourth Amendment issues.

Carter and Johns argue that Officer Thielen violated Minnesota's invasion of privacy statute when he approached the apartment and looked inside the window. Respondents' Brief On the Merits, at p. 27, citing Minn. Stat. § 609.746, subd.1(a). This Court has made it clear that state privacy and trespass laws are not dispositive of Fourth Amendment issues. *California v. Greenwood,* 486 U.S. 35, 43, 108 S.Ct. 1625, 1630 (1988). To hold otherwise would allow states to control the determination of constitutional privacy interests through statutory definition and subsequent state court interpretation of privacy or trespass laws. This Court should also recognize that no Minnesota court reviewing this case ever made a finding that the investigating officer violated Minnesota's privacy statute. This Court should not now engage itself in an interpretation of state statutes and their application to the instant case.

2. Officer Thielen did not violate Minnesota invasion of privacy statutes when he looked into the window of the apartment.

Respondents' argument as to whether Officer Thielen violated state privacy laws ignores the fact that Officer Thielen made his observations from an area common to others. Officer Thielen did not cross onto the apartment's curtilage. After an exhaustive examination of relevant facts, the trial court specifically so held. *Order Pursuant to Omnibus Hearing, (J.A., infra, pp. E10-11).* The Minnesota Supreme Court expressly declined to reverse this factual

finding. As the Minnesota Supreme Court noted, "It is at least arguable that Thielen's position just outside the apartment window was a common area and not the curtilage of the apartment." *State v. Carter*, 569 N.W.2d 169, 177 (1997) n.10 (J.A., infra., p. A20). Therefore, Officer Thielen did not enter the property of another which is a necessary prerequisite for the application of this statute. See, Minn. Stat. § 609.746, subd.1(a)(1).

Additionally, Officer Thielen is charged with the responsibility of preventing and detecting crime and the enforcement of the criminal statutes. Minn. Stat. § 626.84, subd.1(c). When Officer Thielen approached the window he was investigating a recent report of illegal drug activity inside the apartment. Because Officer Thielen was merely fulfilling his duty as a licensed police officer, he was not in violation of any state privacy laws. See, *State v. Smith*, 386 N.W.2d 403, 405 (Minn.App.1986), review denied July 16, 1986.

D. The State of Minnesota did not concede in its written brief to the Minnesota Supreme Court that Officer Thielen was standing within the curtilage of the apartment.

Respondents claim that the State, in its brief to the Minnesota Supreme Court, conceded that Officer Thielen's observations were from an area within the curtilage of the apartment and as such this Court should not address this issue. Respondents' Brief on the Merits, p. 29. The State of Minnesota made no such concession.

Carter and Johns' position is a clear misrepresentation to this Court as it is taken completely out of context. The sentence quoted by respondents is in that portion of the argument section of the State of Minnesota's brief to the Minnesota Supreme Court that was dedicated to the standing issue. Its clear purpose was to indicate that in order for Carter

and Johns to prevail they must establish a legitimate expectation of privacy not only within the apartment, but within the curtilage of the apartment as well. Any misconception as to whether the State conceded that Officer Thielen was within the curtilage of the apartment is clarified in the second argument of the State's brief to the Minnesota Supreme Court. The second argument was entitled, "B. Officer Thielen did not violate Appellant's constitutional right against unreasonable searches and seizures as his observations of Appellant's actions were in plain view and *made from a location outside the curtilage of the apartment.*" (Emphasis added.) Respondents' brief to the Minnesota Supreme Court, p. 10. In this section of the prior brief, the state argued at length the very issue respondents' erroneously claim the state waived. Therefore, Carter and Johns' allegation that the state previously conceded that Officer Thielen was within the curtilage of the apartment should be summarily rejected as an improper attempt to limit the review of this Court.

CONCLUSION

For the foregoing reasons and those stated in Petitioner's opening brief, the judgment of the Minnesota Supreme Court should be reversed.

Respectfully submitted,

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